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7 MICHELLE MORAN,
8 Plaintiff,
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10 v.
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12 EDGEWELL PERSONAL CARE, LLC, et
13 al.,
14 Defendants.

15 Case No. 21-cv-07669-RS

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28 **ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

I. Introduction

Plaintiff Michelle Moran brings this putative class action on behalf of consumers nationwide who purchased Defendant Edgewell Personal Care's ("EPC") Banana Boat branded sunscreen products. Moran avers that statements on Banana Boat products indicating that the sunscreen is "Reef Friendly" are false as the products contain ingredients harmful to coral reefs, and that she would not have purchased a Banana Boat sunscreen with that claim had she known the statement was false. She asserts various common law claims on behalf of a proposed nationwide class, and various violations of California law on behalf of a proposed California subclass. EPC brings this motion to dismiss pursuant to Federal Rules of Civil Procedure 8, 9(b), 12(b)(1), 12(b)(2), 12(b)(6), and 12(f). The motion to dismiss is granted as to advertisements other than the "Reef Friendly – No Oxybenzone or Octinoxate" claim on the sunscreen labels, and as to the claim for breach of implied warranty. The motion to dismiss is denied in all other respects.

II. Factual Background

EPC sells sunscreen products under the brand Banana Boat. These products, of which over ten are at issue in this lawsuit, contain a claim on the label stating “Reef Friendly – No Oxybenzone or Octinoxate.” On behalf of a proposed nationwide class and a subclass of California consumers, Moran brings breach of warranty and unjust enrichment/restitution claims. Moran also brings three additional claims on behalf of the proposed California subclass: violation of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; and the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*.

III. Failure to State a Claim Under Rule 12(b)(6)

Defendant raises multiple arguments under Federal Rule of Civil Procedure 12(b)(6): (1) Plaintiff’s CLRA, UCL, and FAL claims should be dismissed because Plaintiff fails to meet the reasonable consumer standard, and (2) the breach of warranty claim should also be dismissed because Defendant did not make an express or implied warranty and because the implied warranty claim fails for lack of privity.¹ For the reasons explained below, these arguments are granted in part and denied in part.

A. Legal Standard

Rule 12(b)(6) governs motions to dismiss for failure to state a claim. A complaint must contain a short and plain statement of the claim showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a). While “detailed factual allegations” are not required, a complaint must have sufficient factual allegations to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A Rule 12(b)(6) motion tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When evaluating such a motion,

¹ Defendant also contends that Plaintiff fails to allege facts sufficient to establish she is entitled to restitution. This argument, while a Rule 12(b)(6) argument, is addressed in the discussion of Plaintiff’s equitable claims.

1 courts generally “accept all factual allegations in the complaint as true and construe the pleadings
2 in the light most favorable to the nonmoving party.” *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th
3 Cir. 2005).

4 **B. Discussion**

5 *1. Reasonable Consumer Standard*

6 The UCL, FAL, and CLRA all utilize the reasonable consumer standard, *Shaeffer v.*
7 *Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1136 (2020), “which requires a plaintiff to show
8 potential deception of consumers acting reasonably in the circumstances—not just any consumers.”
9 *Hill v. Roll Internat. Corp.*, 195 Cal. App. 4th 1295, 1304 (2011). “[W]hether a business practice
10 is deceptive will usually be a question of fact not appropriate for decision” on a motion to dismiss.
11 *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Defendant argues that the
12 inclusion of “No Oxybenzone or Octinoxate” below the statement “Reef Friendly” on the label
13 means that no reasonable consumer would be misled, because a reasonable consumer would only
14 interpret the label to mean that there was no oxybenzone or octinoxate in the product. This inquiry
15 is “fact-intensive and not well-suited for resolution at the pleading stage.” *White v. Kroger Co.*,
16 No. 21-CV-08004-RS, 2022 WL 888657, at *2 (N.D. Cal. Mar. 25, 2022). Plaintiffs aver—with
17 support from some scientific studies and regulators—that some of the chemicals in the challenged
18 products damage coral reefs. It is inappropriate to conclude at the pleadings stage that a reasonable
19 consumer would have interpreted the label to mean that the product was only free from
20 oxybenzone or octinoxate, regardless of possible harms from other chemicals. The questions of
21 whether the other chemicals in the products are harmful to reefs, and how a reasonable consumer
22 would have interpreted the claim on the label, can only be resolved after the development of
23 evidence in this case. The motion to dismiss is therefore denied as to Defendant’s theory that the
24 reasonable consumer standard cannot be met as a matter of law.

25 *2. Breach of Warranty Claim*

26 Defendant argues that Plaintiff has failed to state a claim for breach of an express or
27 implied warranty. “To prevail on a breach of express warranty claim, Plaintiffs must prove: (1)

1 ‘the seller’s statements constitute an affirmation of fact or promise or a description of the goods;
2 (2) the statement was part of the basis of the bargain; and (3) the warranty was breached.’’ *Brown*
3 *v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 899-900 (N.D. Cal. 2012) (quoting *Weinstat v.*
4 *Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010)). Defendant’s arguments concerning the
5 breach of express warranty claim are repetitive of the arguments discussed above; courts have held
6 that when a plaintiff adequately pleads falsity of an advertising claim under California consumer
7 protection statutes, the plaintiff also has adequately pled a breach of express warranty based on
8 those claims. *See, e.g., In re S.C. Johnson & Son, Inc. Windex Non-Toxic Litigation*, Case No. 20-
9 cv-03184-HSG, 2021 WL 3191733, at *9 (N.D. Cal. July 28, 2021). Here, Plaintiffs have
10 adequately pled that the ‘‘Reef Friendly’’ label indicated more than just the absence of oxybenzone
11 and octinoxate, and thus Plaintiff has pled a claim for breach of express warranty. The motion is
12 therefore denied as to the breach of express warranty claim.

13 Defendant next argues that the breach of implied warranty claim fails because plaintiff
14 cannot show privity. The privity requirement has an exception for ‘‘when the plaintiff relies on
15 written labels or advertisements of a manufacturer[.]’’ *Clemens v. DaimlerChrysler Corp.*, 534
16 F.3d 1017, 1023 (9th Cir. 2008), but Defendant argues this exception ‘‘is applicable only to
17 express warranties.’’ *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 696 (1954). Plaintiff argues
18 that courts have ‘‘relaxed’’ this requirement ‘‘when the plaintiff relies on written labels or
19 advertisements of a manufacturer[.]’’ *Roper v. Big Heart Pet Brands, Inc.*, 510 F. Supp. 3d 903,
20 924 (E.D. Cal. 2020) (quoting *Van Mourik v. Big Heart Pet Brands, Inc.*, No. 3:17-CV-03889-JD,
21 2018 WL 1116715, at *5 (N.D. Cal. Mar. 1, 2018)). As this Court has previously noted, however,
22 the holding from the California Supreme Court in *Burr v. Sherwin Williams* that the privity
23 exception only applies to express warranties has never been overruled. *See In re Sony PS3 Other*
24 *OS Litig.*, No. C-10-1811-RS, 2011 WL 672637 (N.D. Cal. Feb. 17, 2011) (explaining that a case
25 which said the privity requirement could be ‘‘relaxed’’ was ‘‘not consistent with clear California
26 precedent that privity remains a requirement in implied warranty claims even though it has been
27 eliminated in express warranty claims’’). The motion to dismiss is thus granted as to the breach of

1 implied warranty claim.

2 **IV. Failure to Meet the Pleading Requirements of Rule 9(b)**

3 Defendant contends that Plaintiff has not met the heightened pleading standard of Federal
4 Rule of Civil Procedure 9(b). When a claim is “grounded in fraud” a pleading “must satisfy the
5 particularity requirement of Rule 9(b)[,]” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th
6 Cir. 2009), which requires the party to “state with particularity the circumstances constituting
7 fraud or mistake.” Fed. R. Civ. P. 9(b). Defendant argues that “[i]t is facially impossible for
8 Plaintiff to explain what is false about the ‘Reef Friendly – No Oxybenzone or Octinoxate’ claim
9 and why it is false[.]” Motion to Dismiss, p.10. Plaintiff has set out in her Complaint “what
10 representation is allegedly misleading, where and how defendants make the representation, and
11 why plaintiff contend[s] it is misleading.” *White v. Kroger*, 2022 WL 888657, at *3. The motion to
12 dismiss for failure to plead with particularity is therefore denied.

13 Defendant also argues that Plaintiff makes vague references to “advertising” and
14 “marketing” without any further explanation, and that to “the extent Plaintiff’s claims rely on any
15 marketing or advertising aside from the ‘Reef Friendly – No Oxybenzone or Octinoxate’ claim,
16 they must be dismissed.” Motion to Dismiss, p.10. Plaintiff does not identify any other marketing
17 claims or forms of advertisements in her Complaint. To the extent Plaintiff’s claims are predicated
18 on anything other than the “Reef Friendly – No Oxybenzone or Octinoxate” claim, the motion to
19 dismiss is granted.

20 **V. Article III and Statutory Standing**

21 **A. Legal Standard**

22 Standing is a requirement for federal court jurisdiction. *See Spokeo, Inc. v. Robins*, 578
23 U.S. 330, 337-38 (2016). To establish standing, “[t]he plaintiff must have (1) suffered an injury in
24 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to
25 be redressed by a favorable judicial decision.” *Id.* at 338. The party asserting federal subject matter
26 jurisdiction has the burden of proving the existence of jurisdiction. *Chandler v. State Farm Mut.*
27 *Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

B. Discussion

Defendant raises a variety of arguments concerning standing. Defendant first argues that Plaintiff has not sustained an injury-in-fact because she did not use the product near any coral reef or in the ocean. That is not Plaintiff's theory of injury; instead, she argues that she has suffered an injury-in-fact due to purchasing a product at a higher price than she would have, had she known that the reef-friendly claim was false as she alleges. "A quintessential injury-in-fact" is alleged when plaintiffs aver they "spent money that, absent defendants' actions, they would not have spent." *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (concluding plaintiffs adequately pled an injury-in-fact when they alleged "they paid more for their homes than the homes were worth at the time of sale"). As for the challenge to Plaintiff's standing to bring nationwide claims and the inclusion of products she did not purchase, as the Court stated in a similar class action brought by the same attorneys, "challenges to plaintiff's standing with respect to specific sunscreen products he did not purchase and to his ability to represent a nationwide class both represent matters that are better addressed at the class certification stage[.]" *White v. Kroger*, 2022 WL 888657, at *3.

Defendant further challenges Plaintiff's statutory standing. Statutory standing concerns the elements of a claim and "whether a plaintiff states a claim for relief[,] which "relates to the merits of a case, not to the dispute's justiciability," and thus this argument falls more appropriately under the realm of Rule 12(b)(6) rather than Rule 12(b)(1). *See Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 n.4 (9th Cir. 2011) ("Statutory 'standing, unlike constitutional standing, is not jurisdictional.'" (quoting *Noel v. Hall*, 568 F.3d 743, 748 (9th Cir. 2009)). Defendant argues that Plaintiff does not meet the injury requirement of the California statutes. The California statutes she pleads, however, "demand[] no more than the corresponding requirement under Article III of the U.S. Constitution." *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015). Thus, Plaintiff has satisfied the injury requirement of statutory standing.

Plaintiff has also adequately alleged reliance on the “Reef Friendly” claim. Reliance under the FAL, CLRA, and UCL “requires that a plaintiff allege she saw and read deceptive statements.”

Cohen v. E. W. Tea Co., LLC, No. 17-CV-2339-JLS (BLM), 2018 WL 3656112, at *4 (S.D. Cal. Aug. 2, 2018). Plaintiff here alleges that she saw and read the allegedly deceptive statements on the label, and thus has adequately alleged reliance.²

VI. Equitable Relief

Citing *Sonner v. Premier Nutrition*, 971 F.3d 834, 844 (9th Cir. 2020) for the proposition that a plaintiff “must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL and CLRA[,]” Defendant argues that the equitable claims should be dismissed because Plaintiff has failed to establish she lacks an adequate remedy at law. Plaintiff points out that Defendant’s argument only addresses her claim for restitution, not her forward-facing claim for injunctive relief. Further, she argues that at the pleading stage, she may plead claims in the alternative, and need not allege that she does not have an adequate remedy at law. Notably, Defendant does not respond in its reply to Plaintiff’s arguments concerning whether she has an adequate remedy at law.

“[T]he import of *Sonner* at the pleading stage is an unsettled question of law and has given rise to an intra-circuit split.” *Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, No. 19-CV-00792-EMC, 2022 WL 844152, at *7 (N.D. Cal. Mar. 22, 2022) (collecting cases). As a number of other courts in this district have concluded, “*Sonner* does not preclude a plaintiff from pleading equitable remedies in the alternative.” *Id.*; see also *Nacarino v. Chobani, LLC*, No. 20-CV-07437-EMC, 2022 WL 344966, at *9 (N.D. Cal. Feb. 4, 2022) (“*Sonner* teaches that a plaintiff, on the eve of trial, cannot create an inadequacy of a legal remedy by eliminating its availability by taking volitional action.”); *Jeong v. Nexo Fin. LLC*, No. 21-CV-02392-BLF, 2022 WL 174236, at *27 (N.D. Cal. Jan. 19, 2022) (“The Court finds that *Sonner* has limited applicability to the pleading stage because it pertained to circumstances in which a plaintiff dropped all damages claims on the eve of trial.”). The motion to dismiss the claims for equitable relief due to the availability of

² To the extent Plaintiff alleges reliance on advertisements or marketing other than the label, the motion is granted, as also addressed in the discussion of the Rule 9(b) arguments. Plaintiff has not alleged that she relied on any statements other than those on the product label.

1 remedies at law is therefore denied. “The issue of Plaintiff’s entitlement to seek the equitable
2 remedy of restitution may be revisited at a later stage.” *Nacarino*, 2022 WL 344966, at *10.

3 Additionally, Defendant argues that Plaintiff has failed to allege facts to establish she is
4 entitled to restitution, contending that “Plaintiff fails to allege any facts indicating that the Product
5 she allegedly purchased was worth any less than what she paid or, indeed, that she did not receive
6 the benefit of her bargain because she did not or could not use the product for its intended purpose
7 to protect her from harmful rays of the sun.” Motion to Dismiss, p.25. This argument essentially
8 repeats the same arguments Defendant makes concerning the lack of an injury-in-fact, and is
9 rejected for the same reason. Plaintiff has adequately pled that she paid more for a “Reef Friendly”
10 product than a product that did not contain those advertised qualities. She has therefore adequately
11 pled facts that she is entitled to restitution.

12 **VII. Preemption and Primary Jurisdiction**

13 Defendant next argues that dismissal is warranted because the state law claims are
14 preempted by federal law, and because the primary jurisdiction doctrine permits this Court to stay
15 or dismiss claims which fall within the jurisdiction of a federal agency. As explained, dismissal is
16 not warranted under either doctrine.

17 “Federal preemption occurs when: (1) Congress enacts a statute that explicitly pre-empts
18 state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative
19 field to such an extent that it is reasonable to conclude that Congress left no room for state
20 regulation in that field.” *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (internal quotation
21 marks and citation omitted). Federal preemption may be express or implied. *Atay v. Cnty of Maui*,
22 842 F.3d 688, 699 (9th Cir. 2016). Neither express nor implied preemption applies here.

23 Defendant argues that Plaintiff’s claims are expressly preempted because Plaintiff’s claims
24 would impose labelling requirements different than those implied by the Federal Food, Drug, and
25 Cosmetic Act (“FDCA”), and contends that Plaintiff’s claims are impliedly preempted because of
26 the “extensive and exclusive regulation of the Products” by the Food and Drug Administration
27 (“FDA”). Motion to Dismiss, p.16. Defendant, however, cites no authority to establish that the

FDCA or the FDA regulates environmental claims such as “Reef Friendly.” Defendant thus has failed to demonstrate that the claims are expressly or impliedly preempted.

The primary jurisdiction doctrine applies when there is: “(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Clark v. Time Warner*, 523 F.3d 1110, 1115 (9th Cir. 2008). “In practice, this means that the court either stays proceedings or dismisses the case without prejudice, so that the parties may seek an administrative ruling.” *Id.* at 1115. The doctrine of primary jurisdiction may only be properly invoked “in a limited set of circumstances”; it “is not designed to ‘secure expert advice’ from agencies every time a court is presented with an issue conceivably within the agency’s ambit.” *Id.* at 1114 (internal quotations omitted). “It is to be used only if a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency.” *Id.* (internal quotations omitted).

Defendant argues that the primary jurisdiction doctrine applies because the “FDA is in the process of promulgating new OTC sunscreen regulations that cover all of the ingredients relevant to Plaintiff’s claim” and states “[t]his Court should defer to the FDA’s expertise[.]” Motion to Dismiss, p.16. District courts must “consider whether invoking primary jurisdiction would needlessly delay the resolution of claims.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 760 (9th Cir. 2015). “Under [Ninth Circuit] precedent, ‘efficiency’ is the ‘deciding factor’ in whether to invoke primary jurisdiction.” *Id.* Here, the possibility that FDA regulations will change in a way that will materially impact the outcome of this litigation “is too remote at this juncture to warrant a stay or dismissal[.]” *Kroger*, 2022 WL 888657, at *2. The primary jurisdiction doctrine therefore does not apply.

VIII. Conclusion

The motion to dismiss is granted as to Plaintiff's ability to pursue liability for advertisements other than the "Reef Friendly – No Oxybenzone or Octinoxate" claim on the

1 sunscreen labels, and as to the claim for breach of implied warranty. The motion to dismiss is
2 denied in all other respects. Although it appears unlikely the defects in the Complaint can be
3 cured, Plaintiff is granted leave to amend.³ Any amended complaint must be filed by 21 days from
4 the date of this Order.⁴

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6 **IT IS SO ORDERED.**

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8 Dated: August 2, 2022

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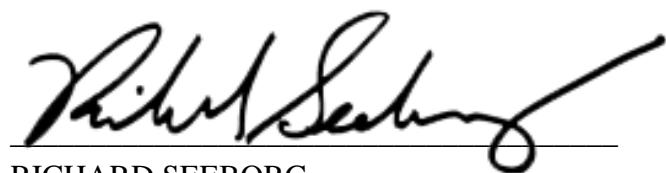
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RICHARD SEEBORG
Chief United States District Judge

United States District Court
Northern District of California

³ Plaintiff also filed a motion for leave to file a Second Amended Complaint, to make a factual correction to her complaint. The motion is denied as moot, because leave to amend the complaint has been granted.

⁴ Defendant's motion for leave to file a statement of recent decision is denied.